Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE
UNITED STATES

October Term, 1978

No. 78-1507

JESS RICKMAN,

Petitioner

v.

MODERN AMERICAN MORTGAGE CORPORATION
and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN F. MOREHEAD
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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associates Justices of the Supreme Court of the United States:

The Petitioner, JESS RICKMAN, prays that a writ of certiorari issue to review a judgment and opinion by the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, p. 9 , infra) is unreported. The Memorandum of Decision of the District Court (Appendix B, p.20, infra) and the Supplement to the Memorandum of Decision (Appendix B, p.20 , infra) were not directed to be published.

## JURISDICTION

The judgment of the Court of Appeals, affirming the District Court's judgment (Appendix A, p.9 , infra) was entered November 2, 1978. A motion for rehearing (timely filed) was denied on December 15, 1978. (See Appendix C, p.34, infra). The jurisdiction of this Court is invoked under Title 28 USC 1254(1).

## QUESTION PRESENTED

The Court of Appeals held that the Petitioner waived his defense to the Respondent's counterclaim by failing to plead an affirmative defense as required by Rule 8(c) F.R.C.P. The question presented is whether the defense to the counterclaim was tried by consent, thus invoking the proscriptions of Rule 15(b) F.R.C.P. If the defense to the counterclaim was tried by consent, then the Fifth Circuit erred in refusing to consider the questions presented to the Court of Appeals relating to the defense.

## FEDERAL RULES INVOLVED

The following Federal Rules of Civil Procedure are involved in the present case and may be found in Title 28 U.S.C.A,:



Rule 8(c):

> "In pleading to a preceding pleading, a party shall set forth affirmatively ... failure of consideration..."

Rule 15(b):

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. . . ."

## STATEMENT OF THE CASE

The Petitioner was the owner and mortgagor of a newly constructed mobile home park. The Respondent was the mortgagee. Mobile Sites Construction Company, Inc. was the General Contractor during the construction of the mobile home park. Petitioner sued Respondent in the state court for usury, and Respondent counterclaimed based on a check (Appendix E, p.38 infra), written pursuant to an escrow agreement (Appendix F, p. 39 , infra). The Petitioner (counter-defendant) answered the counterclaim in the state court with a general denial. Later, Petitioner made the Federal National Mortgage Association (assignee of Respondent) a party defendant to the usury suit. The Federal

National Mortgage Association removed the case to the United States District Court for the Northern District of Texas. 28 U.S.C.A. 1441. Federal jurisdiction was based on diversity. 28 U.S.C.A. 1332.

The case proceeded to trial in the federal court without the Petitioner having amended the answer he had filed in the state court, thus there was no pleading of an affirmative defense to the check. F.R.C.P., Rule 8(c), 28 U.S.C.A.

Mobile Sites Construction Company (the general contractor) was the payee of the check made the basis of the counterclaim. The check was given simultaneously with and pursuant to an "escrow agreement" executed between Petitioner and Respondent at the time the permanent loan was closed. As a result of the escrow arrangement, the Respondent, as the endorsee of the check, was aware of Petitioner's defense against Mobile Sites and could not, therefore, be a holder in due course of the check. "A holder in due course is a holder who takes the instrument ... without notice ... of any defense against or claim to it on the part of any person." Tex. Bus. & Commerce Code Section 3.302(a).

The payee of the check (general contractor) had not completed a "stand of grass" pursuant to the general contract. The Petitioner defended the suit on the check at the trial, proving conclusively the defense of failure of consideration, and also proving that the Respondent knew of the defect when they accepted the check.

Page 74 line 12 through page 78 line 16 and page 79 line 17 through page 80 line 8 contain the direct and cross-examination relating to Petitioner's defense to the check. F.R.C.P., Rule 15(b), 28 U.S.C.A. These pages are reproduced in the Appendix H, p.48, infra.



The Court of Appeals held that Petitioner waived his defense by failing to plead same. We say that the admission of evidence, unobjected to, brings Rule 15(b) into play.

The testimony reproduced in the Appendix shows that the same obligation on which the Respondent based his counterclaim was the subject matter of another lawsuit, by the Trustee in Bankruptcy of the general contractors. Between the time of the trial in the U.S. District Court and the decision of the Court of Appeals, this second suit was tried. Petitioner won, using the same defense he used in the trial of this case. (Appendix G, p. 46, infra).

## REASON FOR GRANTING THE WRIT

The federal courts have consistently held that the requirements of Rule 8(c) relating to pleading affirmative defenses, do not apply when evidence as to the matter which should have been pleaded is introduced without objection. The first case so holding is found in an opinion by Augustus N. Hand in Tillman v. National City Bank of New York, 118 F.2d 631 (2d Cir. 1941).

Both of the leading treatises on federal procedure also state the same Rule. In Wright & Miller Federal Practice and Procedure: Civil Section 1278, under Rule 8(c) we find the following: "Even as late as trial, if evidence relating to an unpleaded defense is introduced without objection, Rule 15(b) requires the pleading to be treated as if they had actually raised the issue." Also in 2A Moore's Federal Practice, Section 8.27(3) at Page 1853 the following rule is announced:

> "If an affirmative defense is not pleaded, it is waived to the extent

> that the party who should have pleaded the affirmative defense may not introduce evidence in support thereof, unless the adverse party makes no objection in which case the issues are enlarged, ..."

The most complete discussion which we have found relating to the issue of waiver for failure to plead an affirmative defense, when testimony is introduced at the trial without objection is found in Lomarira v. American Automobile Insurance Co., 245 F. Supp. 124 (D.C. - Connecticut 1965), Affirmed 371 F.2d 550 (2d Cir. 1967). At Page 129 we find the following:

> "Once an issue is raised and the parties have had an opportunity to present evidence thereon a determination on the merits of the issue should be made. Indeed, Rule 15(b) is not permissive in its direction that issues tried by a complied consent of the parties 'shall be treated in all respects as if they had been raised in the pleadings.' (Emphasis added). With respect to such issues, failure to amend the pleadings in order to set forth the issues explicitly does not affect the trial thereof, it being 'the duty of the court to consider issues raised by evidence received without objection even though no formal application is made to amend.'"

Other cases to the same general affect: Joyce v. Stewart, 227 F.2d 407 (C.A. - D.C., 1955); Lopez v. U.S.F.&G., 18 F.R.D. 59 (DC - Alaska 1955); Kaye v. Smitherman, 225 F.2d 853 (10th Cir. 1955); Overseas Motors, Inc. v. Import Motors, Ltd., 375 F. Supp. 499 (E.D. Michigan - 1974).



We respectfully submit that the offer and introduction of evidence regarding our defense, without any objection, invoked Rule 15(b) which requires that the defense be considered plead.

The Fifth Circuit's holding, although not addressed directly in their opinion, is in conflict with the clear wording of Rule 15(b) and every other case construing said Rule.

## CONCLUSION

The Court of Appeals should have considered our defense. The Court below erred when they said we waived our defense.

Respectfully submitted,

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Austin, Texas 78701
512/476-6666

By _____
JOHN F. MOREHEAD

Attorneys for Petitioner

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari has been mailed, certified mail, to Thompson, Knight, Simmons & Bullion, 2300 Republic National Bank Building, Dallas, Texas 75201; and to Golden, Potts, Boeckman & Wilson, 2300 Republic National Bank Tower, Dallas, Texas 75201, attorneys for Respondents, this the 29 day of March, 1979.

JOHN F. MOREHEAD



APPENDIX A

RICKMAN v. MODERN AMERICAN MORTG. CORP.

Jess RICKMAN, Plaintiff-Appellant,

v.

MODERN AMERICAN MORTGAGE CORPORATION, Nancy Skelton and Federal National Mortgage Association, Defendants-Appellees.

No. 76-4155.

United States Court of Appeals, Fifth Circuit.

Nov. 2, 1978.

Borrower brought action against lenders charging usury in which one lender filed counterclaim for recovery of amount of check sent lender and dishonored by borrower. The United States District Court for the Northern District of Texas, Robert W. Porter, Jr., entered take nothing judgment against plaintiff on usury claim and an $8,250 award to defendant on counterclaim, and plaintiff appealed. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that the record did not support borrower's usury claim on contracting for or receiving theories.

Affirmed.

1. Usury (Key 82)

In general, American courts deny protection from usury to persons who neither pay nor are obligated to pay on usurious loan.

2. Usury (Key 50)

Despite contention that loan agreement exacted front-end financing charges that were tantamount to interest, where true principal was arrived at by subtracting front-end charges from stated principal and juxtaposition of true principal against interest payments required by loan agreement resulted in true interest rate of 9.89316%, lenders, could not be held liable for usury under contracting for and charging theories. Vernon's Ann.Tex.Civ.St. art. 5069-1.06.

3. Usury (Key 88)

Despite claim that exercise of acceleration clause and subsequent settlement with federal insurer enabled lenders to extract usurious interest through loan agreement, in light of savings clause in loan agreement providing that, irrespective of other contractual terms, amount of interest owed could not exceed lawful limits, lenders could not be held liable for usury under receiving theory. Vernon's Ann.Tex.Civ.St. art. 5069-1.06.

4. Federal Courts (Key 616)

Where borrower failed to raise any defense to lender's counterclaim seeking recovery of amount of check dishonored by borrower after its delivery to lender as part of escrow agreement, borrower could not assert on appeal that escrow agreement was violated. Fed.Rules Civ.Proc. rule 8(c), 28 U.S.C.A.

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Appeal from the United States District Court for the Northern District of Texas.

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.



LEWIS R. MORGAN, Circuit Judge.

This is a usury case arising under the laws of Texas and arriving at this court by way of diversity jurisdiction. The appeal follows a take nothing judgment entered against plaintiff Rickman on his usury claim and a $8,250 award to defendant Modern American Mortgage Corporation (Modern American) on its counterclaim. Another defendant-appellee is Federal National Mortgage Association (Federal National) which purchased the controverted mortgage from Modern American.

The allegedly usurious loan was made to finance a development scheme launched by Rickman in 1969. Planning to construct a mobile home park in Terrell, Texas, Rickman and an associate contacted Modern American in early 1970 seeking a loan to be insured by the Federal Housing Authority. Rickman obtained an FHA commitment and secured a non-recourse loan from Modern American in the principal amount of $577,000 to be repaid over the course of 40 years. Loan disbursements began in August, 1970 and continued through January, 1972 until at least $478,948.69 was advanced either to Rickman or for his benefit. In February, 1972 Modern American assigned its entire interest in the Deed of Trust and note to Federal National.[1]

Unfortunately, the mobile home project failed. No monthly payments were ever made by Rickman and in February, 1972 Federal National declared a default and foreclosed. At the foreclosure sale, Federal National purchased the project for roughly $400,000. Subsequently, title was transferred to the FHA in return for a settlement of Federal National's claim for mortgage insurance proceeds. This settlement included the transfer of 20-year FHA debentures and a small amount of cash to Federal National.

Fortunately for Rickman, the financial collapse of his project did not reach his personal finances. He was not personally obligated on the loan he had secured. Nor had he made any payments against the loan. Subsequent to the failure and foreclosure, though, he brought this suit asserting that the loan transaction by Modern American and Federal National was usurious. Allegedly, the agreement exacted various front-end financing charges that were tantamount to interest.[2] The appellant contends that when this "front-end interest" is added to the interest charged on the fact of the note, the result is an effective interest rate in excess of the 10% statutory limit. Accordingly, Rickman claims entitlement to the statutory penalty of double the amount of the illegal excess. The district court rejected this claim and we affirm that holding.

[1] Preliminarily, the defendants-appellees challenge Rickman's right to the protection of the usury laws urging that he is not an "obligor" within the meaning of the Texas statute. In general, American courts deny protection from usury to persons such as Rickman who neither pay nor are obligated to pay on a usurious loan. 91 C.J.S. Usury 72a. However, currently, in Texas, the question is not entirely free from doubt. In 1967, the usury statute was revised and the phrase "person paying the same" was replaced by "obligor." See Note following 15 Vernon's Ann.Civ.Stat. art. 5069-1.06 (1971). While the former language would clearly dispose of the nonpaying Rickman, the broader term "obligor" offers less certainty and has not been construed by a Texas court. There is at least an argument that because his property was subjected to the obligation, the appellant was entitled to protection from usury. Cf. Ellis v. Security Underground Storage, Inc., 329 S.W.2d 313, 315 (Tex.Civ.App. 1960). Therefore, although entertaining serious doubts as to



Rickman's status as an obligor, we turn to a more clearly settled basis of Texas law to resolve this case.[3]

[2] Even if the appellant were an obligor, his claim could not prevail on the merits. We need not dissect the potential liabilities of the two lenders Modern American and Federal National because it is clear that even when combined, their actions do not offend Texas' usury law. The statutory provision governing Rickman's suit is Section 5060-1.06 of the Revised Civil Statutes of Texas which provide:

> (1) Any person who contracts for, charges or receives interest which is greater than the amount authorized by this Subtitle, shall forfeit to the obligor twice the amount of interest contracted for, charged or received, and reasonable attorney fees. . .

Texas courts have emphasized that this language is disjunctive thereby providing alternative theories of recovery that include the contracting, charging or receipt of usurious interest. Windhorst v. Adcock Pipe & Supply, 547 S.W.2d 260 (Tex.1977). In present case, there is no serious argument that the parties contracted for or charged usurious interest. The district judge properly interred any such contention through a two-step analysis of the loan contract. First, the court subtracted the front-end charges from the stated principal to arrive at the true principal in accordance with settled Texas doctrine. E. g., Adleson v. B. F. Dittman & Co., 124 Tex. 564, 80 S.W.2d 939, 940 (1935). Next, the court juxtaposed this new figure of the true principal against the interest payments required by the contract to compute the true rate of interest. Imperial Corporation of America v. Frenchman's Creek Corp., 453 F.2d 1338 (5th Cir. 1972). In this

way, the impact of front-end charges was spread over the entire 40 year life of the agreement yielding a true interest rate of 9.89316%. Accordingly, the court correctly absolved the defendants of usury under the contracting for and charging theories.

While accepting that, by its terms, the contract was not necessarily usurious, the appellant maintains that the exercise of the acceleration clause, and the subsequent settlement with the FHA, enabled the defendant to extract usurious interest through the loan agreement. Thus, the appellant urges that the defendant incurred liability for usury by receiving excessive interest. According to this argument, the true principal was roughly $478,000, the total amount actually dispersed to the appellant. By declaring a default and foreclosing, the defendants were allegedly demanding payment for the full amount of stated principal--$577,000. Such an amount, being claimed just 16 months after the execution of the loan transaction, would obviously entail an annual return well in excess of 10% of the initial outlay. Not only was a usurious sum demanded through the exercise of acceleration, but the appellant argues that an illegal sum was actually received via the FHA settlement. Because this was a settlement in full, it discharged pro tanto the entire indebtedness claimed by Federal National; since the amount of that claimed indebtedness was usurious, the full compensation received for it arguably amounted to the receipt of a usurious sum.

[3] Though intriguing, the appellant's argument must fail. Even assuming that full settlement of a claimed debt constitutes receipt of the entire sum claimed for usury purposes, the effect of the savings clause in this contract cannot be overlooked.[4] This clause provides that, irrespective of other contractual



terms, the amount of interest owed the lender cannot exceed lawful limits. Thus, when Federal National asserted its claim for the debt by accelerating the loan, this claim was automatically reduced bringing the interest rate to the legal limit of 10%.

> If the (saving clause) can be given effect, and, as already said, it must be given some effect if it is reasonably possible to do so . . . it denies the note-holder the right to collect more than the principal debt and 10 per cent, interest per annum. . .

Imperial Corp. of America v. Frenchman's Creek Corp., supra, quoting, Nevels v. Harris, 129 Tex. 190, 102 S.W.2d 1046, 1049-1050 (1937). Therefore, when Federal National pressed its demand for the full amount due under the contract, it claimed an amount automatically constricted within the bounds of law thereby eliminating the possibility that illegal interest was claimed.[5] Accordingly, even assuming that the value assigned to the FHA settlement is to be derived from the amount of Federal National's claim against the appellant, both the claim and the settlement were confined within lawful parameters.

Moreover, a similar result obtains when the FHA settlement accorded its actual value rather than attributing to it the value of the claimed indebtedness. The appellant owed principal in at least the amount of $478,948.69. This sum, which was advanced periodically from September, 1970 until January, 1972 permitted a lawful accrual of interest totalling some $175,000[6] by the time of the FHA settlement in September, 1974. Thus, Federal National could receive from the FHA as much as the combination of these sums, some $650,000, without enjoying more than the lawful 10% return on the original

outlay. In fact the face value of the debentures was in the amount of $564,150. This was safely under the amount permitted by statute. We therefore conclude that Federal National did not receive usurious interest on the loan, and, as discussed earlier, no excessive interest was contracted for or charged. Accordingly, appellant's claim for usury must fail.

[4] The appellant also challenges the district court award of $8,250 on the counterclaim of Modern American. This sum was recovered after the appellant dishonored a check delivered to Modern American as part of an excrow agreement. In the proceedings below, the appellant failed to raise any defense to the counterclaim. His assertion in this appeal that the escrow agreement was violated comes too late. Fed.Rules Civ.Proc. rule 8(c). See e. g., Funding Systems Leasing Corporation v. Pugh, 530 F.2d 91, 96 (5th Cir. 1976). The judgment of the lower court is therefore

AFFIRMED.

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1. By this agreement, Federal National agreed to purchase a ratable participating share of 95% of each monthly disbursement made by Modern American.

2. The appellant claims the following front-end charges constituted interest:

(1) Federal National's Discount..$27,181.41
(2) Federal National's Financing Fee.....$11,542.00
(3) Purchasing and Marketing Fee.....$ 2,885.00

When these sums are added to the interest eo nomine of $46,865.79, the total amount of



alleged interest is $88,474.70.

3. The defendants-appellees contend that the FHA, rather than Rickman, is the real "obligor" in the transaction. Technically, though, the FHA might well be viewed as a "guarantor" of the loan and, as such, would probably be denied the benefit of usury laws. Vernon's Ann.Tex.Stat. art. 1302-2.09 (1971). Universal Metals & Machinery, Inc. v. Bohart, 539 S.W.2d 874, 879 (Tex. 1976). Thus, if Rickman is denied the opportunity to bring suit, it is entirely possible that no party would be able to challenge the allegedly usurious practices of Modern American and Federal National.

4. The savings clause provides as follows:

> In the event any item, items, terms or provisions contained in this instrument are in conflict with the laws of the State of Texas, this instrument shall be affected only as to its application to such item, items, terms or provisions, and shall in all other respects remain in full force and effect. It is understood and agreed that in no event and upon no contingency shall the maker or makers of the note secured hereby, or any party liable thereon or therefor, be required to pay interest in excess of the rate allowed by the laws of the State of Texas. The intention of the parties being to conform strictly to the usury laws as now or hereinafter construed by the Courts having jurisdiction.

We reject the appellant's claim that this language is insufficient. Nevels v. Harris, 129 Tex. 190, 102 S.W.2d 1046, 1048 (1937).

5. Thus, the defendants-appellees may not be said to have "charged" illegal interest. As discussed earlier, by its terms, the contract

did not "charge" illegal interest. Moreover, because of the savings clause, the amount charged by the act acceleration was automatically confined within permissible boundaries.

Like the district court, we are assuming only for purposes of argument that the front-end charges constituted interest. Thus, our decision in no way resolves the status of the alleged interest; such a determination presents a question of fact for the district court. Frenchman's Creek, 453 F.2d at 1344.

6. All parties agree that at least $478,948.69 was actually disbursed. The following computations are contained in Federal National's brief and are not disputed by the appellant:

| Advances | To or For Borrower | Interest at 10% From Date of Advance to February 1, 1972 |
|---|---|---|
| 1. 8/14/70 | $ 69,392.89 | $10,190.30 |
| 2. 9/25/70 | 19,945.55 | 2,690.48 |
| 3. 10/ 1/70 | 38,763.20 | 5,182.59 |
| 4. 11/ 9/70 | 71,467.51 | 8,791.48 |
| 5. 12/17/70 | 13,732.88 | 1,546.36 |
| 6. 1/ 8/71 | 21,817.16 | 2,325.17 |
| 7. 3/ 3/71 | 51,979.87 | 4,770.76 |
| 8. 3/15/71 | 89,581.53 | 7,927.35 |
| 9. 4/ 8/71 | 66,788.61 | 5,471.18 |
| 10. 8/25/71 | | |
| Final 1/20/72 | 35,479.49 | 116.64 |
| TOTALS: | $478,948.69 | $49,021.31 |

It is further calculated that from the time of default in February 1972 until the time of the FHA settlement in September 1974 interest accrued at 10% for an additional amount of $126,363.72.



Thus, by the time of the FHA settlement, the permissable return was $654,200, some $90,000 less than the amount of the face value of the FHA debentures.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JOSEPH McELROY, JR., CLERK
By /s/
Deputy

| | | |
|---|---|---|
| JESS RICKMAN | ) | |
| | ) | |
| VS. | ) | |
| | ) | |
| MODERN AMERICAN | ) | CIVIL ACTION |
| MORTGAGE CORP. AND | ) | NO. 3-7925-F |
| FEDERAL NATIONAL | ) | |
| MORTGAGE ASSOCIATION | ) | |

MEMORANDUM OF DECISION

This is a diversity case in which the Plaintiff, Jess Rickman, contends that the Defendants, Modern American Mortgage Corporation [MAMC] and Federal National Mortgage Association [FNMA] received in excess of ten percent interest on an outstanding loan in violation of Texas usury law. Tex.Rev.Civ.Stat.Ann. 5069-1.06 (1971). Plaintiff urges that three items were charged and received by the Defendant during the disbursements of the loan in its initial stages which, when added to the interest charged on the face of the note [eo nomine] amounts to greater than the ten percent allowable interest. Plaintiff therefore claims double the amount of interest in excess of ten percent allegedly received by the Defendant and attorneys' fees. After full consideration of all facts adduced at trial without jury on February 24, 1976, and after full consideration of all briefs and argument of counsel, I find, for the following reasons, that Defendants did



not receive an amount greater than that allowable by law and that therefore Plaintiff must take nothing in this suit.

I. THE TRANSACTION

In 1969 Mr. Rickman became convinced that a man named Baldridge had a solid money-making scheme to develop a mobile home park in Terrell, Texas. With the aid of an urban planning firm Mr. Rickman, a lawyer, proceeded to crystalize the physical and monetary requirements of the project which was later to be named the Tierra Del Verde Mobile Home Park. In early 1970, MAMC was contacted by Rickman and Baldridge concerning an F.H.A. insured loan for the construction of the project. Subsequent thereto, Rickman and Baldridge submitted, in conjunction with MAMC an "Application for Project Mortgage Insurance". On June 12, 1970, the F.H.A. issued to MAMC, Rickman and Baldridge a commitment for project advances. On June 14, 1970 the Federal National Mortgage Association [FNMA] executed an Advance Commitment Contract committing themselves to purchase, on or before July 11, 1972, the note insured by the Federal Government, in the principal amount of $577,100.00. The consideration for executing the commitment was $5,771.00. That commitment fee was paid by Plaintiff on July 30, 1970, but later that sum was reimbursed to Rickman out of the initial draw on the loan. Plaintiff has withdrawn his complaint that the July 30 payment of the commitment fee should be characterized as interest. See Gonzalez County Savings and Loan Association v. Freeman, 19 Tex.Sup.Ct. J. 277 (1976). On July 29, 1970 Baldridge formally notified FHA that he would withdraw leaving Rickman as the sole proprietor of the project. MAMC and FNMA agreed on August 10, 1970, that FNMA would purchase a 95% participation in the funding of the loan during the construction phase of the contract. The charge to Rickman for this

advance commitment amounted to a discount of $27,181.41 from the loan amount. The FNMA discount was retained by MAMC out of its first advance to the Plaintiff. At the time of the purchase by FNMA it paid to MAMC the outstanding principal balance less the discount fee. Plaintiff complains that the $27,181.41 discount is interest. FNMA also charged a fee of $8,636.50 in addition to the discount which consisted of the $5,771.00 reimbursement to Rickman for the amount he expended on July 14, 1972 as consideration for the FNMA advance commitment contract and $2,885.50 which represents a reimbursement to Rickman of a purchase and marketing fee paid to MAMC. Plaintiff complains that $2,885.50 of the FNMA fee is interest within the meaning of the usury statute. A financing fee of $11,542.00 was also paid by Rickman to MAMC $4,042.00 of which was eventually paid over to FNMA. Between August 14, 1970 and September 21, 1974, when FHA finally settled FNMA's claim, various disbursements of funds were made in connection with the development of the project. Those transactions are set forth in the margin.[1]

In summary, Plaintiff contends that the following monies were received by the Defendants and that those amounts when added to the amount of interest charged on the face of the note is in excess of that rate of interest allowed by law.

(1) Interest eo nomine.....$46,865.79
(2) FNMA Discount.....$27,181.41
(3) The FNMA financing fee.....$11,542.00
(4) The purchasing and marketing fee.....$ 2,885.50

TOTAL.....$88,474.70

Plaintiff further contends that the relevant time period over which the interest rate must be computed is the real lifetime of the loan or from



the initial closing in August of 1970 until the foreclosure in July of 1972. As a matter of law, Defendants contend that the amounts received, even if interest, should be spread over the entire forty year lifetime of the loan. All parties agree that if the forty year period is chosen as the relevant time period, the amount of interest received by the Defendants will be less than the usurious rate.

## II. TO LUMP OR TO SPREAD?

Plaintiff clearly alleges and attempts to prove his case on the basis of interest received rather than on the interest charged in the contract. That is, Plaintiff attempts to recover on the amount of interest received during the first several years of the note rather than on the contracted interest. In proceeding under the received theory Plaintiff mistakenly hopes to avoid the spreading feature of the contract. Compare W. E. Grace Manufacturing Co. v. Levin, 306 S.W.2d 580, 584 (Tex.Sup.--1974) with Imperial Corp. of America v. Frenchman's Creek, 453 F.2d 1338 (5th Cir. 1972).

The three contested amounts charged at the front end of the loan, even when added to the eo nomine interest, do not exceed the maximum allowable interest rate. Under Texas law, it is well settled that front end charges are to be subtracted from the stated principal, with interest then recomputed on the actual principal. Rather than lumping the entire front end charge of the loan into the first several years, as interest, the Texas courts have taken a more realistic view of such transactions and they simply recompute the actual interest on the acutal loan.[2] It is possible for contracts to fall within the reach of the usury proscription if the stated principal is reduced substantially and the stated interest is already close to the usurious rate.

When the contested charges are lumped together as interest on the front end of the loan and default pretermits the loan in a time far short of the contracted payout period then the actual interest rate will necessarily be "squeezed" to a higher and perhaps usurious rate. On the other hand, when the charge merely reduces the principal, and a new rate is computed, on the actual amount loaned to the debtor, it is the lifetime of the loan over which the initial charges must be spread. The last increment of interest is paid on the last payment of the loan and premature termination of the loan does not increase that rate of interest. Thus for example if one were to loan $100 at 9 percent per year for five years one could correctly anticipate paying $45 interest. If one charged a $15 fee on the front end of that loan, which was in reality a device to surreptitiously achieve a higher rate of return on the loan, the actual principal would be computed by subtracting $15 from the $100 stated loan amount. With the $85 actual principal amount computed, one would then ask what percentage of the actual amount the $85 would be the $9 interest charge per year. In the case of our example that actual interest rate would be about 10.6 percent, a rate clearly usurious.[3]

As applied to the facts of this case, and even if one were to assume the inclusion of the FNMA commitment fee which has been prescinded by the Plaintiff, the evidence demonstrates that the actual interest charged over the lifetime of the loan would be 9.89316 percent. Thus under the various assumptions made by this court which are mandated by Texas law, the rate of interest charged the Plaintiff is less than the maximum of 10 percent allowed by law.

This Memorandum of Decision is entered in lieu of findings of fact and conclusions of law. (Rule 52, F.R.Civ.P.)



Plaintiff therefore must take nothing. Counsel for Defendants shall submit a form of judgment consistent with the findings and conclusions set forth above.

It is so ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

September 15, 1976

---

1. On August 14, 1970, the amount of $116,772.80 was drawn down as an insured advance, which moneys were disbursed by M.A.M.C. (See Application for Insurance of Advance Mortgage Proceeds, Exhibit "L" and Participation Certificate, Exhibit "L-1".) None of the disbursements of that draw is claimed by the Plaintiff to have constituted interest, except

a. "F.N.M.A. discount" of $27,181.41 which was retained by M.A.M.C. in escrow for F.N.M.A., and subsequently paid over to F.N.M.A. at the time of purchase by FNMA.

b. "F.N.M.A. fee" of $8,656.50, which was, in fact, two fees, $5,771.00 of which represents a reimbursement to Rickman of the commitment fee paid to FNMA as mentioned above in paragraph 5, and $2,885.50 of which represents a reimbursement to Rickman of a purchase and marketing fee paid to M.A.M.C.

c. "Financing fee" of $11,542.00 retained by M.A.M.C., $4,042.00 of which was paid over to F.N.M.A. at the time of the initial draw request by M.A.M.C.

Defendants contend that none of the disbursements of the August 14, 1970, draw were interest

payments.

F.N.M.A. participated in the funding of the August 14, 1970, draw to the extent of $110,934.16.

(See Exhibits "L" and the ledger sheet, Exhibit "K").

On September 25, 1970, the amount of $21,250.85 was drawn down as an insured advance, which moneys were disbursed by M.A.M.C. $1,305,30 only of said amount was retained by M.A.M.C. as interest. F.N.M.A. participated in the funding of the September 25, 1970 draw to the extent of $20,188.30. (See Exhibits "K", "M" and "M-1").

On September 2 and October 2, 1970, F.N.M.A. received from M.A.M.C. $288.12 and $785.78 as its share of the interest to be and being withheld from the proceeds of the loan. (See Exhibit "N").

On October 1, 1970, the amount of $38,792.89 was drawn down as an insured advance, which moneys were disbursed by M.A.M.C. $29.69 only of said amount was retained by M.A.M.C. as interest. F.N.M.A. participated in the funding of the October 1, 1970, draw to the extent of $36,853.24. (See Exhibits "K", "O" and "O-1").

On November 3, 1970, F.N.M.A. received from M.A.M.C. $1,151.09 as its share of the interest to be and being withheld from the proceeds of the loan. (See Exhibit "N").

On November 9, 1970, the amount of $72,743.98 was drawn down as an insured advance, which moneys were disbursed by M.A.M.C. $1,276.47 only of said amount was retained by M.A.M.C. as interest. F.N.M.A. participated in the funding of the November 9, 1970 draw to the



extent of $69,106.78. (See Exhibits "K", "P" and "P-1").

On December 3, 1970, F.N.M.A. received from M.A.M.C. $1,418.26 as its share of the interest to be and being withheld from the proceeds of the loan. (See Exhibit "N").

On December 12, 1970, the amount of $15,340.86 was drawn down as an insured advance, which moneys were disbursed by M.A.M.C. $1,607.98 only of said amount was retained by M.A.M.C. as interest. F.N.M.A. participated in the funding of the December 12, 1970, draw to the extent of $14,573.81. (See Exhibits "K", "Q" and "Q-1").

On January 5, 1971, F.N.M.A. received from M.A.M.C. $1,706.86 as its share of the interest to be and being withheld from the proceeds of the loan (See Exhibit "N").

On January 8, 1971, the amount of $23,672.37 was drawn down as an insured advance, which moneys were disbursed by M.A.M.C. $1,855.21 only of said amount was retained by M.A.M.C. as interest. F.N.M.A. participated in the funding of the January 8, 1971, draw to the extent of $22,488.75. (See Exhibits "K", "R" and "R-1").

On February 1 and March 1, 1971, F.N.M.A. received from M.A.M.C. $1,878.14 and $1,941.85 as its share of the interest to be and being withheld from the proceeds of the loan. (See Exhibit "N").

On March 3, 1971, the amount of $54,024.55 was drawn down as an insured advance, which moneys were disbursed by M.A.M.C. $2,044.68 only of said amount was retained by M.A.M.C. as interest. F.N.M.A. participated in the funding of the March 1971 draw to the extent of

$51,323.32. (See Exhibits "K", "S" and "S-1").

On April 1, 1971, F.N.M.A. received from M.A.M.C. $2,523.62 as its share of the interest to be and being withheld from the proceeds of the loan. (See Exhibit "N").

On March 15, 1971, the amount of $91,463.19 was drawn down as an insured advance, which moneys were disbursed by M.A.M.C. $1,881.66 only of said amount was retained by M.A.M.C. as interest. F.N.M.A. participated in the funding of the March 15, 1971, draw to the extent of $86,890.03. (See Exhibits "K", "T" and "T-1").

On April 8, 1971, the amount of $69,598.81 was drawn down as an insured advance, which moneys were disbursed by M.A.M.C. $2,810.20 only of said amount was retained by M.A.M.C. as interest. F.N.M.A. participated in the funding of the April 8, 1971, draw to the extent of $66,118.87. (See Exhibits "K", "U" and "U-1").

On May 6, June 8, July 9 and August 6, 1971, F.N.M.A. received from M.A.M.C. $3,201.87, $3,389.20, $3,389.20 and $3,389.20 as its share of the interest to be and being withheld from the proceeds of the loan. (See Exhibit "N").

On August 25, 1971, the amount of $11,715.53 was drawn down as an insured advance, which moneys were disbursed by M.A.M.C. $11,129.75 only of said amount was retained by M.A.M.C. as interest. F.N.M.A. participated in the funding of the August 25, 1971, draw to the extent of $11,129.75. (See Exhibits "K", "V" and "V-1").

On September 2, October 8, November 4, December 6, 1971 and January 5, 1972, F.N.M.A. received from M.A.M.C. $3,389.20, $3,465.41, $3,468.03, $3,468.03 and $3,468.03 as its share



of the interest to be and being withheld from the proceeds of the loan. (See Exhibit "N").

On January 20, 1972, the final closing was held in which $61,524.17 was drawn down as an insured advance, which moneys were disbursed by M.A.M.C. $23,159.18 of said amount was retained by M.A.M.C. as interest. Plaintiff contends that an additional sum of $2,885.50 retained by M.A.M.C. as a "Purchase and Marketing Fee" on said date constituted interest, a contention disputed by Defendants.

The Defendants contend that this additional Purchase and Marketing Fee was collected by M.A.M.C. by mistake, and in any event cannot be construed as interest.

F.N.M.A. participated in the funding of the January 20, 1972, F.N.M.A. participated in the funding of the January 20, 1972, draw to the extent of $58,447.96. (See Exhibits "K", "W" and "W-1").

As of January 20, 1972, the total disbursements under the Rickman note was in the amount of $576,900. F.N.M.A.'s participation in said loan was $548,054.97. (See Exhibit "W").

On February 1, 1972, the Rickman mortgage and note were sold to F.N.M.A. (See Exhibits "X" and "Y"). Against the purchase price of the mortgage was credited the interest due F.N.M.A. at the time of final closing, the purchase and marketing fee of $2,884.50, and the purchase discount of $27,171.99, inter alia. (See Exhibit "Z").

On January 20, 1972, Rickman and M.A.M.C. executed an Escrow Deposit Agreement and contemporaneously therewith Rickman delivered a check for $8,250.00 into M.A.M.C.'s hands. (See Exhibits "AA" and "BB").

Subsequently thereto, said check was refused payment by Rickman, after having been endorsed over by the payee to M.A.M.C. (See Exhibit "CC").

Subsequent to January 20, 1972, Rickman failed to make timely payments on the note to F.N.M.A. and F.N.M.A. declared a default and posted the land for a foreclosure sale to take place on July 4, 1972. (See Exhibit "DD").

On July 4, 1972, the project was sold by Trustee's sale to F.N.M.A. for $396,619.85. (See Exhibit "EE").

On September 21, 1974, F.H.A. settled F.N.M.A.'s claim for mortgage insurance proceeds.

2. See Adleson v. B. F. Dittman Co., 80 S.W.2d 939, 940 (Tex. 1935); Braniff Inv. Co. v. Norton, 80 F.2d 598 (1935); Eubanks v. Simpson, 90 S.W.2d 291 (Tex.Civ.App.--Amarillo, 1936); Nevels v. Harris, 102 S.W.2d 1046, 1049 (Tex. 1937); Imperial Corp. of America v. Frenchman's Creek Corp., 453 F.2d 1338, 1346 (5th Cir. 1972).

3. The Court is pleased to note that at page 3 of the Plaintiff's reply brief, filed June 11, 1976, gives a similar example and clearly acquiesces to the court's analysis.



IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JOSEPH McELROY, JR., CLERK
By /s/ _____
Deputy

| | | |
|---|---|---|
| JESS RICKMAN | ) | |
| | ) | |
| VS. | ) | |
| | ) | CIVIL ACTION |
| MODERN AMERICAN | ) | NO. 3-7925-F |
| MORTGAGE CORPORATION | ) | |
| AND FEDERAL NATIONAL | ) | |
| MORTGAGE ASSOCIATION | ) | |

SUPPLEMENTAL MEMORANDUM OF DECISION

On September 15, 1976, this Court entered a Memorandum of Decision on the above styled and referenced case. That decision is modified in two respects by this Supplemental Memorandum of Decision. First, page 2 of the original decision is withdrawn and the attached page, referenced "new page 2" is hereby substituted. My purpose in substituting new page 2 for its predecessor is to clarify my findings on the FNMA-MAMC-Rickman "Advance Commitment Contract" and transaction. No substantive change in my decision flows from this minor factual clarification nor is any intended.

Second I supplement my original decision to include resolution of Defendant MAMC's counterclaim against Plaintiff Rickman as follows:

1. Jess Rickman refused payment of a check drawn by Plaintiff and endorsed over to and held by Defendant Modern American Mortgage Corporation.

2. Jess Rickman is liable to Modern American Mortgage Corporation in the sum of $8,250.00, plus interest thereon at the legal rate from January 20, 1972 until date of judgment.

It is so ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

September 24, 1976

NEW PAGE 2

the Tierra Del Verde Mobile Home Park. In early 1970, MAMC was contacted by Rickman and Baldridge concerning an F.H.A. insured loan for the construction of the project. Subsequent thereto, Rickman and Baldridge submitted, in conjunction with MAMC an "Application for Project Mortgage Insurance". On June 12, 1970, the F.H.A. issued to MAMC, Rickman and Baldridge a commitment for project advances. On June 14, 1970 the Federal National Mortgage Association [FNMA] executed an Advance Commitment Contract committing themselves to purchase, on or before July 11, 1972, the note insured by the Federal Government, in the principal amount of $577,100.00. The consideration for executing the commitment was $5,771.00. That commitment fee was paid by Plaintiff on July 30, 1970, but later that sum was reimbursed to Rickman out of the initial draw on the loan. Plaintiff has withdrawn his complaint that the July 30 payment of the commitment fee should be characterized as interest. See Gonzalez County Savings and Loan Association v. Freeman, 19 Tex.Sup.Ct. J. 277 (1976). On July 29, 1970 Baldridge formally notified FHA that he would withdraw leaving Rickman as the sole proprietor of the project. MAMC and FNMA agreed on August 10, 1970, that FNMA would purchase a 95% participation in the funding of the loan during the construction



phase of the contract. The charge to Rickman for this advance commitment amounted to a discount of $27,181.41 from the loan amount. The FNMA discount was retained by MAMC out of its first advance to the Plaintiff. At the time of the purchase by FNMA it paid to MAMC the outstanding principal balance less the discount fee. Plaintiff complains that the $27,181.41 discount is interest. FNMA also charged a fee of $8,636.50 in addition to the discount which consisted of the $5,771.00 reimbursement to Rickman for the amount he expended on July 14, 1972 as consideration for the FNMA advance commitment contract and $2,885.50 which represents a reimbursement to Rickman of a purchase and marketing fee paid to MAMC. Plaintiff complains that $2,885.50 of the FNMA fee is interest within the meaning of the usury statute.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

NO. 76-4155

---

JESS RICKMAN,

Plaintiff-Appellant,

versus

MODERN AMERICAN MORTGAGE CORPORATION, NANCY SKELTON, and FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendants-Appellees.

---

Appeal from the United States District Court for

the Northern District of Texas

---

ON PETITION FOR REHEARING

(December 15, 1978)

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be



and the same is hereby (DENIED).

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JOSEPH McELROY, JR., CLERK
By /s/
Deputy

| | | |
|---|---|---|
| JESS RICKMAN | ) | |
| | ) | |
| VS. | ) | |
| | ) | CIVIL ACTION |
| MODERN AMERICAN | ) | NO. 3-7925-F |
| MORTGAGE CORPORATION | ) | |
| AND FEDERAL NATIONAL | ) | |
| MORTGAGE ASSOCIATION | ) | |

J U D G M E N T

Trial, without jury, was commenced on February 24, 1976 before the Honorable Robert W. Porter, United States District Judge. All issues having been duly tried and a decision rendered,

It is ORDERED and ADJUDGED that Plaintiff take nothing, that the action be dismissed on the merits, and that Defendant, Modern American Mortgage Corporation and Defendance, Federal National Mortgage Association, each recover of the Plaintiff, Jess Rickman, its costs of action.

It is further ORDERED and ADJUDGED that the Defendant, Modern American Mortgage Corporation, recover $8,250.00 plus interest at the rate from January 20, 1972 to date from the Plaintiff, Jess Rickman, together with interest thereon from date at the legal rate.

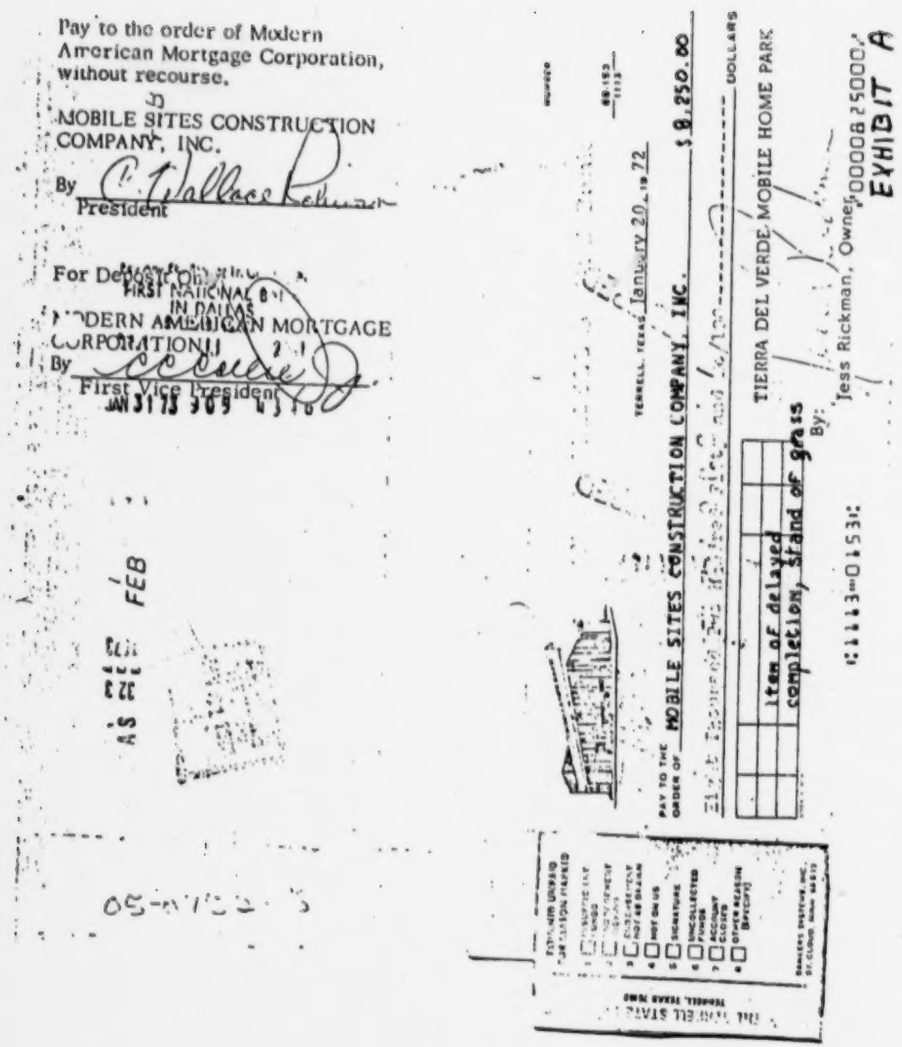


It is so ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

September 24, 1976

APPENDIX E






APPENDIX F

U.S. DEPARTMENT OF HOUSING AND

URBAN DEVELOPMENT

FEDERAL HOUSING ADMINISTRATION

ESCROW DEPOSIT AGREEMENT

THIS AGREEMENT made this 20th day of January, 1972, by and between TIERRA DEL VERDE MOBILE HOME PARK (hereinafter called "Mortgagor") (Mortgagor) party of the first part, and MODERN AMERICAN (Depository) MORTGAGE CORPORATION, (hereinafter called "Depository"), party of the second part.

WITNESSETH:

WHEREAS, The above-named Mortgagor is now constructing a housing project in Terrell County of Kaufman, State of Texas, identified as Tierra Del Verde Mobile Home Park, (FHA Project (Name of project) No. 112-00066-M) under a certain Building Loan Agreement between the Mortgagor and MODERN AMERICAN MORTGAGE CORPORATION, (hereinafter (Mortgagee) called "Mortgagee"), dated the 14th day of August, 1970, which Building Loan Agreement is by reference incorporated herein and made part hereof; and

WHEREAS, the said Mortgagor has not at the present time completed certain improvements required by said Building Loan Agreement as listed in the exhibit attached hereto, identified as "Exhibit A", but intends to complete said improvements; and

WHEREAS, in order to induce the Mortgagee to advance the entire amount of the loan provided for in said Building Loan Agreement and in order to induce the Federal Housing Administration to insure said loan in its entirety prior to completion of all said improvements, the Mortgagor desires to provide security for the completion of said improvements;

NOW, THEREFORE, for and in consideration of the premises hereinabove set forth, the parties hereto agree as follows:

1. The Mortgagor covenants and agrees:

(a) To complete the improvements enumerated in Exhibit A on or before the 20th day of January, 1973, the said work to be done and completed free and clear of all liens and in accordance with the Drawings and Specifications referred to in said Building Loan Agreement. The Mortgagor further agrees to pay for all work and material necessary for completion of said work.

(b) That all work performed pursuant to the provisions of this agreement shall be subject to the Labor Standards Procedures and Prevailing Wage Requirements accepted by the original general contractor in executing FHA Form No. 2482, Contractor's Certificate of Prevailing Wage Requirements. The terms and provisions of said Form No. 2482, are hereby specifically accepted by the Mortgagor. Prior to release of any funds provided for herein, Mortgagor shall submit FHA Forms No. 2403A, duly executed by each and every contractor performing any of the work and dated subsequent to completion of such work.

2. The Mortgagor herewith deposits with the Depository, and the Depository acknowledges receipt thereof, the sum of $8,250.00, which



said sum shall be held by the Depository and disbursed as follows:

(a) In the event the Mortgagor completes the construction of said improvements in accordance with the Drawings and Specifications above referred to on or before the date agreed to in Paragraph 1 above, and there is no default under the mortgage, the Depository shall upon receipt of written approval of said work from the Federal Housing Administration return to the Mortgagor, without interest, the sum herewith deposited.

(b) In the event the Mortgagor fails to complete the improvements on or before the date agreed to in Paragraph 1, or defaults under the mortgage, the Depository, upon receiving written instructions from the Federal Housing Administration so to do, shall pay to the Mortgagee the unexpended balance of the sum herewith deposited to be applied in the amount and manner specified by said Administration to the obligations of the Mortgagor.

(c) In the event the Mortgagor fails to complete the said improvements on or before the date agreed in Paragraph 1 above in accordance with said Drawings and Specifications and fails to produce to the Depository the written approval of said work by the Federal Housing Administration, or in the event the Depository receives from the Federal Housing Administration on or after said date notice that the said improvements have not been completed in accordance with Drawings and Specifications, the Mortgagee, subject to the approval of the Federal Housing Administration, shall have the right and/or option to proceed to complete said work in accordance with the Drawings and Specifications and pay the cost thereof, including all costs and charges of the Depository and Mortgagee from the sum herewith deposited, and for this purpose the Mortgagor hereby irrevocably authorizes and

empowers the Mortgagee to do and perform for it, the said Mortgagor and in its name, place and stead, with full powers of substitution, all matters and things which the said Mortgagee shall in its judgment deem necessary and proper to be done to effectuate the completion of the said improvements in accordance with the Drawings and Specifications and to apply the moneys herewith deposited to the payment of debts contracted or incurred for work done or for materials furnished therefor, or either, in and about said work and for all expenses, costs and charges in connection therewith, and this warrant of attorney shall be the Mortgagee's full and sufficient authority, and the orders given and signed by the Mortgagee as attorney-in-fact for the Mortgagor shall be good and sufficient vouchers for all payments made by virtue thereof. Further, in such event the Mortgagor hereby irrevocably authorizes and empowers the Mortgagee to enter into and upon the said Project and take charge thereof together with all materials and appliances thereunto belonging, and in the name of the Mortgagor, as its attorney-in-fact, to call upon and require the several contractors for work to be done and for materials to be furnished in and about the completion of said improvements to proceed to complete the said improvements in accordance with the Drawings and Specifications or any changes, alterations, additions or modifications of the same as may be deemed expedient or necessary by the Federal Housing Administration and to do whatsoever in the Mortgagee's judgment shall be necessary to be done to secure the completion of the said improvements according to the Drawings and Specifications and in accordance with the instructions of the Federal Housing Administration. In the event the work is completed by the Mortgagee in accordance with provisions hereof and written approval of said work is given by the Federal Housing Administration, any unexpended balance of the sum deposited with the Depository shall



thereupon be returned to the mortgagor without interest unless the mortgage is in default. The Mortgagee shall in no event be responsible for the completion of the said work beyond the expenditure of the sum herewith deposited and if said sum is insufficient for such purpose the Mortgagee shall be under no obligation to proceed further with the work or to demand or obtain additional sums from the Mortgagor. This warrant of attorney is granted with full power of substitution and the Mortgagor hereby specifically agrees that all powers granted to the Mortgagee hereunder may be assigned by it to the Federal Housing Administration.

3. It is the intention of the parties to this Agreement that the Depository shall act solely at all times on instructions from the Federal Housing Administration with respect to the said sum deposited with it by the Mortgagor and for so acting the Mortgagor hereby expressly releases and relieves the said Depository of any and all liability or claims of any nature. The said Depository shall have a prior lien on said fund, however, for any and all costs or expenses incurred by it (including court costs and reasonable attorney's fees) by reason of acting as Depository of the said fund.

4. In the event the Mortgagee acts as Depository, the name Depository wherever used herein shall be construed as referring to said Mortgagee acting in the capacity of Depository.

5. This Agreement is entered into by the parties hereto for the benefit of the holder of any mortgage on said project insured by the Federal Housing Commissioner and for the benefit of the Federal Housing Commissioner either of which shall have the right to act as Depository and/or enforce the provisions hereof.

IN WITNESS WHEREOF, the parties hereto have hereunto caused these presents to be executed on their behalf and their seals affixed the day and year first above written.

ATTEST: _____

TIERRA DEL VERDE MOBILE HOME PARK
(Mortgagor)

_____ By /s/_____
(President)
Jess Rickman, Owner

ATTEST: _____

MODERN AMERICAN MORTGAGE CORPORATION
(Depository)

_____ /s/_____
(~~President~~)
~~G. G. Collie, Jr.~~
~~Second~~ Vice President
(Asst.)



EXHIBIT A

| | |
|---|---|
| Stand of Grass | $8,250.00 |

APPENDIX G

NO. 26,997

| | | |
|---|---|---|
| WILLIAM A. WINSTON, TRUSTEE FOR MOBILE SITE CONSTRUCTION COMPANY | ) | IN THE DISTRICT COURT OF |
| VS. | ) | KAUFMAN COUNTY, TEXAS |
| JESS RICKMAN | ) | 86TH JUDICIAL DISTRICT |

JUDGMENT

On this the 28th day of March, 1977, the above entitled and numbered cause coming on for trial in its regular order, came the parties and announced ready for trial, and a lawful jury being called, selected and sworn for the trial of said cause, the pleadings and the evidence were heard by the Court and the jury, and at the conclusion of the evidence and the announcement by Plaintiff's counsel that the Plaintiff had rested his case, Defendant did file his motion for an instructed verdict, and the Court being of the opinion that judgment should be for Defendant as a matter of law, the Court gave the jury a peremptory instruction to return a verdict for Defendant, and such verdict being rendered in obedience to the instruction, IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing by his suit against Defendant, and that said Defendant recover of Plaintiff his costs in this behalf expended and go hence without day, and that all costs be taxed against Plaintiff.

And the Defendant and Cross-Plaintiff, Jess Rickman, having waived his Cross-Action, IT IS ORDERED, ADJUDGED AND DECREED that Defendant take nothing by his cross-Action against Plaintiff. It is further ORDERED, ADJUDGED AND DECREED that any relief not granted as above



is specifically denied.

Plaintiff in open court here and now excepts to this Judgment and gives notice of appeal to the Court of Civil Appeals for the _____ Supreme Judicial District at _____, Texas.

ENTERED this 13th day of May, 1977.

/s/
Thomas H. Crofts, Judge of the
86th Judicial District Court of
Kaufman County, Texas

APPROVED AS TO FORM:

/s/
Douglas S. Lang, Attorney for Plaintiff
917 Republic National Bank Tower
Dallas, Texas 75201

/s/
Fred Drast, Attorney for Defendant
305 Anderson Building
Terrell, Texas 75160

APPENDIX H

matter of courtesy he called me and told me he had had the sale.

Q But no one bid on your behalf at that foreclosure sale?

A No, sir.

MR. BOECKMAN: I believe that's all of the questions I have, Your Honor.

THE COURT: All right. Do you have further questions, Mr. Morehead?

MR. MOREHEAD: Yes, I do, Your Honor.

REDIRECT EXAMINATION

BY MR. MOREHEAD:

Q Mr. Rickman, there was a cross action filed when this case was in the state court by Modern American Mortgage Company in the amount of $8,250. Do you recall issuing a check for that amount at the time of the final closing on or about January 20, 1972?

A Yes, sir.

Q What was to become of this money, please?

MR. HUFFMAN: I am going to object to any answer that is based on hearsay. I don't think there has been an adequate predicate of actual knowledge.

THE COURT: Well, if he knows of his own knowledge.



MR. MOREHEAD: That's my question: What was the agreement where this money was going to be placed between you and the payee of the check?

MR. HUFFMAN: If there is any written agreement, that speaks for itself, and any oral statement concerning the terms of the agreement would be improper, and I would object to it on that ground.

THE COURT: Well, what is the basis of the agreement? Is it an oral agreement?

MR. MOREHEAD: I think that there is a written document in the stipulations, Your Honor, that we can use to clear this matter up.

THE COURT: All right.

Q Mr. Rickman, I refer you to the document which has been marked as Exhibit AA which is entitled FHA Form 2456, Escrow Deposit Agreement. Are you familiar with that document?

A Yes, sir.

Q Did you sign same?

A Yes, sir.

Q Did you deliver, pursuant to that document, did you deliver a check to Modern American Mortgage Company in the amount of $8,250?

A Yes, sir.

Q And does that document provide where the money is to be placed?

MR. HUFFMAN: I'll object to any testimony. I think that the document speaks for itself.

THE COURT: Well, what does the document say?

MR. MOREHEAD: The document says, Exhibit A on the back. On the back, it says "sand of grass," and it has that amount of money.

THE COURT: Well, I guess if it speaks for itself --

MR. HUFFMAN: I don't mind the witness reading the document. I do mind the witness construing the document.

THE COURT: Well, any document that is admitted into evidence I will construe as a matter of law and won't accept any verbal construction of it put on it by a witness, unless there is clearly some basis for it.

Q Granting that there might be ambiguity, Mr. Rickman, about the term "grass," would you explain to us --

THE COURT: I have had the criminal docket in this court for seven months. Up to this point, there has not been any ambiguity.

Q -- as to what this item was about, please?

A The contractor had improperly seeded or sodded a place, and it had caused a great deal of trouble about trying to mow it, get it restarted and this, that and the other, and they were supposed to take some corrective actions, and that is what this was about.

Q And so this was escrowing money for the contractor?

A Yes, sir.



Q Now, did the contractor -- who was the contractor first?

A Mobile Sites, I think.

Q Have you received any sort of communications or know what happened to Mobile Sites, Inc.?

A Yes, sir. They are in bankruptcy.

Q And who was appointed trustee in bankruptcy?

A William A. Winston.

MR. HUFFMAN: We object to that statement on the ground that it has not been proven that it's not based on hearsay.

MR. MOREHEAD: It's part of the records of this court, Your Honor, in Cause Number BK-3-3359.

THE COURT: Is there really any dispute about that fact?

MR. HUFFMAN: I am just keeping my tabs on the plaintiff.

THE COURT: Well, I will overrule the objection.

Q Who was appointed the trustee in bankruptcy?

A Mr. William A. Winston.

Q And did Mr. Winston institute suit against you?

A Yes, sir.

Q Did this suit, which has been instituted against you, make a claim against you for this $8,250?

A Yes, sir.

Q And I take it that Mr. Winston is a trustee of Mobile Sites Construction Company making the claim that he is the owner of this cause of action?

A Yes, sir.

Q And have you filed an answer and are you defending that lawsuit?

A Yes, sir, I filed a sworn denial and a cross action.

Q And what is the present status of that litigation at this time?

A It's now pending. They took a set of depositions in it, oh, about two weeks ago, three. It's pending on the docket in the District Court of Kaufman County, Texas.

MR. MOREHEAD: I believe that's all. We pass the witness.

THE COURT: All right. Do you have further questions?

RECROSS EXAMINATION

BY MR. HUFFMAN:

Q Mr. Rickman, you stated that you had had no contact with Fannie Mae prior to January 20, 1972. Were you speaking of no personal contact, you had never met anybody from Fannie Mae?



A Mr. Berg is the first man from Fannie Mae that I remember. If I had some, I don't remember. Mr. Berg, these letters are from Mr. Berg. Evidently I was assigned to his --

Q When you were speaking of contacts, you were speaking of personal contacts?

A Personal contacts, yes.

Q You had signed one letter, at least one letter, going to Federal National Mortgage Association?

A You are talking about that receipt, sir?

Q Yes, sir.

A I signed that receipt. I did not know where it would go. I did sign for it.

Q Did you sign for that money and were you told it was passed on to Fannie Mae?

A That's what they talked about the $5,771. That's what they --

Q Y ou did stop payment on the $8,250 check, which has been attached as Exhibit BB?

A I didn't stop payment. I closed the account on the 18th day of April, 1972. I had gotten in a very serious dispute with Mobile Sites by this time, and we were not getting along very well.

Q And when you closed out the account, in other words, there was no account for this check to be drawn on?

A No, sir. I stopped payment and closed the account on April the 18th, 1972.

Q In your suit with Mobile Sites, have you raised the defense that a check has already been tendered in payment?

A No, sir.

Q You have not?

A We have raised the defense in that based on what Mobile Sites did, sir, and didn't do.

MR. HUFFMAN: Pass the witness.

RECROSS EXAMINATION

BY MR. BOECKMAN:

Q What is the nature of your cross action against Mobile Sites?

A Well, Mobile Sites, you remember me telling you that Mobile Sites had gone into another proposition to develop a subdivision in Terrell, and we applied for a commitment, and our understanding was that, unless we got the commitment, I wasn't to pay anything. Mobile Sites had come in under on this construction job we are on here now, and F.H.A. said they would give us a commitment. They winded up, when we went down to get it, they did not give it to us. Mobile Sites ended up padding my bill with all of the construction work, all of the engineering and everything on the other job, put people on the payroll that didn't work down there and things of this nature.